

Before the
Administrative Hearing Commission
State of Missouri



RODERICK SMITH,

Petitioner,

v.

DIRECTOR OF DEPARTMENT OF
INSURANCE, FINANCIAL
INSTITUTIONS AND PROFESSIONAL
REGISTRATION,

Respondent.

No. 14-1521 DI

DECISION

We grant the motion for summary decision of the Director of the Department of Insurance, Financial Institutions and Professional Registration (the “Director” and the “Department”). The Director has cause to refuse to renew Roderick Smith’s resident insurance producer license because he obtained his license through material misrepresentations, violated the insurance laws of this state, failed to report administrative actions taken against him, failed to report his criminal prosecution, and engaged in fraudulent or dishonest practices demonstrating incompetence, untrustworthiness and financial irresponsibility.

Procedure

On September 15, 2014, Smith filed a complaint asking this Commission to find that he is entitled to an insurance producer license. We set the case for hearing for January 21, 2015, and served a copy of the complaint and our notice of hearing on the Director. The Director filed

an answer on October 15, 2014. On December 5, 2014, the Director filed a motion for summary decision. We allowed Smith until December 22, 2014 to respond to the motion. On December 19, 2014, Smith filed a motion for extension of time to respond to the motion, which we granted. We gave Smith until January 9, 2015 to file a response.

We continued the January 21, 2015 hearing at the request of the Director and re-set this case for April 30, 2015. On January 6, 2015, Smith filed an additional motion for extension of time to respond to the summary decision motion, which we granted, giving Smith until February 9, 2015 to file a response. On February 5, 2015, Smith filed a motion to hold this case in abeyance due to deaths in his family. We treated his motion as a request for continuance and reset the hearing in this case to July 29, 2015 and extended the time for Smith to file a response to the Director's summary decision motion until March 31, 2015. He did not respond.

Admissibility of the Exhibits

On October 15, 2014, the Director propounded his first request for admissions upon Smith, who did not respond to the request. Under Supreme Court Rule 59.01, made applicable to this Commission by 1 CSR 15-3.420, the failure to answer a request for admissions establishes the matters asserted in the request, and no further proof is required. *Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819, 827 (Mo. App., W.D. 1985). Such a deemed admission can establish any fact, or “application of the facts to the law, or the truth of the ultimate issue, opinion or conclusion, so long as the opinion called for is not an abstract proposition of law.” *Briggs v. King*, 714 S.W.2d 694, 697 (Mo. App. W.D. 1986). That rule applies to all parties, including those acting pro se. *Research Hosp. v. Williams*, 651 S.W.2d 667, 669 (Mo. App. W.D. 1983). Section 536.073 RSMo 2000¹ and 1 CSR 15-3.420(1)² apply that rule to this case.

¹Statutory references, unless otherwise noted, are to the 2013 Supplement to the Revised Statutes of Missouri.

²References to “CSR” are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

Under 1 CSR 15-3.446(6)(A), we may grant summary decision “if a party establishes facts that entitle any party to a favorable decision and no party genuinely disputes such facts.” The parties must establish the facts by admissible evidence such as affidavits or discovery responses. 1 CSR 15-3.446(6)(B).

Attached to the Director’s motion are several exhibits that constitute admissible evidence under 1 CSR 15-3.446(6)(B), including a licensing records affidavit for Smith and copies of his uniform application for individual insurance producer license, the unanswered request for admissions, certified court records from Missouri and Texas, a business records affidavit and business records from the Missouri Office of the Chief Disciplinary Counsel, a transcript of a subpoena conference, and further affidavit from a Special Investigator with the Department.

Section 536.073.3 and 1 CSR 15-3.446(6) provide that we may decide this case without a hearing if the Department establishes facts that Smith does not dispute and entitle the Department to a favorable decision. The following facts as established by the Department’s exhibits, as well as those matters admitted through Smith’s own failure to respond, are therefore undisputed.

Findings of Fact

1. The Department first issued Smith a resident insurance producer license for life (non-variable), accident and health insurance on February 22, 2006, in reliance on his sworn representations contained in his application (“2006 application”).

2. Smith answered “no” to question 39.2 of the 2006 application that asks:

Have you...ever been involved in an administrative proceeding regarding any professional or occupational license?

“Involved” means having a license censured, suspended, revoked, canceled, terminated; or, being assessed a fine, placed on probation or surrendering a license to resolve an administrative action.

“Involved” also means being named as a party to an administrative

or arbitration proceeding which is related to a professional or occupational license.

Exhibit 1-A.

3. Smith signed his 2006 application and certified and attested on January 24, 2006 that:

I hereby certify that, under penalty of perjury, all of the information submitted in this application and attachments is true and complete. I am aware that submitting false information or omitting pertinent or material information in connection with this application is grounds for license revocation or denial of the license and may subject me to civil or criminal penalties.

* * *

I acknowledge that I understand and will comply with the insurance laws and regulations of the jurisdictions to which I am applying for licensure.

Id.

4. At the time Smith sent in his license application, he listed on his application that he had practiced law in Missouri from February 1996 to the present.

5. Between May 29, 1999 and November 11, 2002, Smith received ten admonitions from the Region IV Disciplinary Committee, formed under the authority of the Missouri Supreme Court Rule 5.02 to investigate and address attorney misconduct. These admonitions included:

- May 29, 1999 admonition for violation of Missouri Supreme Court Rule 4.1.4 (communication)
- July 31, 1999 admonition for violation of Missouri Supreme Court Rules 4-1.3, 4-1.4 and 4-1.5(a); (diligence, communication and unreasonable fee for failure to return money to a client promptly)
- January 19, 2000 admonition for violation of Missouri Supreme Court Rule 4-1.5(a) (trust account funds and records and using a trust account of client money to pay for dues, bills, office supplies, payroll, car loan, phone bills and parking expenses)
- February 25, 2000 admonition for violation of Missouri Supreme Court Rule 4-1.5(a) (unreasonable fee)

- June 26, 2001 admonition for violation of Missouri Supreme Court Rule 4-1.3 (diligence—received money but acted untimely in resolving legal issue)
- September 4, 2001 admonition for violation of an unspecified Missouri Supreme Court Rule with the reference to a complaint by a former client that Smith failed to render legal services after payment and that Smith paid the former client \$500 to withdraw his complaint to Region IV
- December 18, 2001 admonition for violation of Missouri Supreme Court Rule 4-1.8(a) (acquiring a client’s property without meeting certain requirements)
- May 13, 2002 admonition for violations of Missouri Supreme Court Rules 4-1.3 and 4-1.4 (diligence and communication)
- November 11, 2002 two admonitions for violation of Missouri Supreme Court Rules 4-1.3 and 4-1.4 (diligence and communication)

6. Smith did not include any information about the ten admonitions in his 2006 application.

7. On January 23, 2006, the Missouri Supreme Court suspended Smith from the practice of law after “finding probable cause to believe that [Smith] is guilty of misconduct or is unable to competently represent the interests of his clients and finding evidence that [Smith] pose[d] a substantial threat of irreparable harm to the public...”

8. Smith did not include any information on the suspension case in his 2006 application.

9. On April 20, 2006, Smith was indicted in Texas for theft, a state jail felony, in the case of Texas v. Roderick Earl Smith, in the Fannin County District Court, Cause No. 21772.

10. The Texas criminal case involved allegations against Smith of fraud, misappropriation, conversion of funds, misrepresentation, and breach of fiduciary duty.

11. Smith did not report his indictment to the Director within thirty days.

12. On May 29, 2007, the Missouri Supreme Court disbarred Smith, finding that he violated rule provisions mandating competent representation of clients, charging reasonable fees,

safeguarding client property, and for making false statements or misrepresentations—all subparts of Rule 4, “Rules Governing the Missouri Bar and the Judiciary—Rules of Professional Conduct.”

13. Smith did not report his disbarment to the Director within thirty days.

14. Around November 8, 2007, Smith electronically filed his uniform application for individual insurance producer license seeking licensure to produce insurance for additional lines of property, casualty and variable life (“2007 application”).

15. Smith answered “no” to question 1 of the 2007 application, which asked, “Have you ever been convicted or, or are you currently charged with, committing a crime...?”

16. Smith did not report the pending case from Texas on his 2007 application.

17. Smith answered “no” to question 5 of the 2007 application, which asked, “Are you currently a party to....any lawsuit or arbitration proceeding involving allegations of fraud, misappropriation or conversion of funds, misrepresentation or breach of fiduciary duty?”

18. Smith signed the attestation section of the 2007 application, which is the same as the attestation section of the 2006 application set forth above.

19. The Department licensed Smith on December 14, 2007 for the additional lines of property, casualty and variable life based upon his representations made in his 2007 application.

20. On July 26, 2010, the Texas court conducted a pretrial hearing in Texas v. Roderick Earl Smith. As a result of the pretrial hearing in light of Smith’s disbarment from the practice of law and because the victims had all monies returned to them, the State of Texas dismissed the criminal charges.

21. Smith did not report the pretrial hearing to the Director within thirty days of July 26, 2010.

22. Smith’s resident insurance producer license expired on February 22, 2012.

23. Smith filed a uniform application for individual insurance producer license/registration on October 14, 2013 (“2013 application”).

24. Smith reported his disbarment on his 2013 application and provided a written statement and copies of the disbarment. The disbarment information also contained information regarding the admonitions Smith had previously received and the suspension of his law license.

25. Smith appeared and produced sworn testimony at a subpoena conference with the Department on December 12, 2013. Smith stated that he never notified the Department that he was disbarred and he never notified the Department of the felony action in Texas.

26. The Director issued an order refusing to issue Smith a resident insurance producer license on August 13, 2014, which was served on Smith on August 14, 2014.

Conclusions of Law

Jurisdiction

We have jurisdiction to hear this case. Section 621.045. In cases where there is a refusal to issue, the applicant has the burden to show that he or she is entitled to licensure. Section 621.120, RSMo 2000.

Smith failed to answer a request for admissions and further failed to respond to the Director’s summary decision motion. Statutes and case law instruct that we must “separately and independently” determine whether such facts constitute cause for discipline. *Kennedy v. Missouri Real Estate Commission*, 762 S.W.2d 454, 456-57 (Mo. App. E.D. 1988).

Therefore, we independently assess whether the facts admitted, and supported by the Director’s

admissible evidence, constitute cause to refuse to issue a license.

Director’s Cause for Refusal

The Director asserts there is cause to refuse to issue a license under § 375.141.1, which states:

The director may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for any one or more of the following causes:

- (1) Intentionally providing materially incorrect, misleading, incomplete or untrue information in the license application;
- (2) Violating any insurance laws, or violating any regulation, subpoena or order of the director or of another insurance commissioner in any other state;
- (3) Obtaining or attempting to obtain a license through material misrepresentation or fraud;

* * *

- (8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere[.]

Section 375.141 goes on to provide as follows:

6. An insurance producer shall report to the director any administrative action taken against the producer in another jurisdiction or by another governmental agency in this state within thirty days of the final disposition of the matter. The report shall include a copy of the order or other relevant legal documents.
7. Within thirty days of the initial pretrial hearing date, a producer shall report to the director any criminal prosecution for a felony or a crime involving moral turpitude of the producer taken in any jurisdiction. The report shall include a copy of the indictment or information filed, the order resulting from the hearing and any other relevant legal documents.

We examine, in turn, the grounds for discipline from the complaint, and the facts as established by the record.

Intentionally Providing Materially Incorrect, Misleading, Incomplete or Untrue Information in the 2006 Application and the 2007 Application

The Director asserts that Smith gave a false answer in the 2006 application when he answered “no” to question 39.2 that he had not been involved in any administrative review of

any other professional license and thereby intentionally provided incorrect, misleading, incomplete and untrue information. We agree.

Smith signed his initial application on January 24, 2006—the day after his January 23, 2006 suspension from the practice of law. Though the application was signed on January 24, 2006, it was not received and filed with the Department until February 14, 2006. Smith was well aware of the admonitions he had previously received. These admonitions are issued after an investigation and finding of probable cause to believe that the individual under investigation is guilty of professional misconduct. Mo. Supreme Court Rule 5.11. If the lawyer rejects the admonition, the rules allow for an information to be filed to establish discipline. *Id.* Here, Smith received multiple admonitions, which we construe to be an administrative action against a lawyer. The admonitions should have been reported on his application. Furthermore, the suspension that Smith received was clearly a disciplinary proceeding and should have been reported to the Director on his application.

We find Smith’s misrepresentations on the application to be intentional. Direct evidence of intent is rarely susceptible to direct proof and therefore must generally be established by circumstantial evidence. *State v. Agee*, 37 S.W.3d 834, 837 (Mo. App. S.D. 2001). We may infer the requisite mental state “in light of all surrounding circumstances.” *Missouri Bd. for Arch’ts, Prof’l Eng’rs & Land Surv’rs v. Duncan*, 744 S.W.2d 524,533 (Mo. App. E.D. 1988).

It is beyond the realm of probability that Smith’s response was inadvertent. Smith separately attested to the truth and completeness of his application and was made aware of the consequences of giving false or misleading information. All these circumstances led to the inference that Smith intentionally provided false information on his 2006 application.

We further find Smith’s misrepresentations material. Information is “material” if it has “real importance or great consequences.” MERRIAM-WEBSTER’S COLLEGIATE

DICTIONARY 765 (11th ed. 2004). Smith's bad conduct was important to the Director's consideration of whether to grant him a license as an insurance producer. Information to indicate that Smith's conduct was less than stellar is grounds for the Director to deny a license. This information was plainly material to the application.

There is cause to deny Smith under § 375.141.1(1) based upon Smith's representations in the 2006 application.

For the same reasons, there is cause to deny Smith under § 375.141.1(1) based upon the answers he provided in his 2007 application. In the 2007 application for additional lines of insurance, Smith swore that he was neither charged with committing a crime, nor party to "any lawsuit or arbitration proceeding involving allegations of fraud, misappropriation or conversion of funds, misrepresentation or breach of fiduciary duty." These representations were untrue and misleading, since at the time, the State of Texas had charged Smith with felony theft involving appropriation of property from its owner without consent and by deception and with intent to deprive the owner of the property. These allegations of fraud, misappropriation or conversion of funds are important to an assessment of Smith's qualifications for licensure. Further, Smith failed to provide any documentation of pending suits as required by the application.

Based upon Smith's representations in his 2007 application, we conclude that these representations were intentional, materially incorrect, misleading, incomplete, and untrue. Thus, cause exists to deny his application under §375.141.1(1).

Obtaining a License Through Material Misrepresentation or Fraud

The Director further asserts that there was cause to refuse a license to Smith because he had obtained his 2006 and 2007 licenses through material misrepresentations or fraud under § 375.141.1(3).

As discussed above, we concluded Smith made an intentional misrepresentation of a material fact on both his 2006 and 2007 applications. A misrepresentation is defined as a falsehood or untruth made with the intent and purpose of deceit. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 794 (11th ed. 2004). "Fraud is the intentional perversion of truth to induce another, in reliance on it, to part with some valuable thing belonging to him." *State ex rel. Williams v. Purl*, 128 S.W. 196, 201 (Mo. 1910). Smith's deliberate concealment of the facts of his suspension and admonitions that led up to the suspension and his subsequent concealment of the Texas felony theft were clearly aimed at obtaining a license as an insurance producer in Missouri. Smith made his applications and submitted them under penalty of perjury even though he knew they were false, material, and misrepresented the facts. From the circumstances, we conclude that Smith obtained his insurance producer licenses through material misrepresentation and fraud in both 2006 and 2007, and that there is cause for the Director to refuse to issue a license under § 375.141.1(3).

Violation of the Insurance Laws by Failing to Timely Notify
the Director of an Administrative Action

After Smith became licensed as an insurance producer, he had the obligation to report to the Director within thirty days of the final disposition of "any administrative action taken against" him and to "include a copy of the order, consent order or other relevant legal documents." Section 375.141.6. Smith failed to report the Supreme Court's May 29, 2007 administrative action that disbarred Smith from the practice of law in Missouri. Smith's failure to report this to the Director is an additional cause to refuse to issue an insurance producer license under § 375.141.1(2).

Violation of the Insurance Laws by Failing to Timely Notify the
Director of the Felony Prosecution in Texas

In addition to concealing the fact that he had a pending case in Texas when he was licensed for additional authority in 2007, Smith failed to timely notify the Director of the case when the court conducted a pretrial hearing. Smith agreed that he never reported the Texas action. He was required to provide the Director with a copy of the information or indictment and other relevant court records, but he provided nothing.

Smith did not report his criminal felony charge to the Director within thirty days as required by § 375.141.7, which is an additional cause to refuse him an insurance producer license under § 375.141.1(2).

Fraudulent or Dishonest Practices Demonstrating
Incompetent, Untrustworthiness or Financial Irresponsibility

The Director further had cause to refuse to license Smith pursuant to § 375.141.1(8) because during Smith's former practice of law, he engaged in business conduct that included fraudulent or dishonest practices, demonstrated incompetence, untrustworthiness, or financial irresponsibility.

The request for admissions sets forth the rules Smith violated when he received admonitions in his practice of law. The Department further provided the actual letters of admonition received by Smith. These admonitions show a common theme. We conclude that Smith committed the conduct contained in the admonitions and no further proof is required. *Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819, 827 (Mo. App. W.D. 1985). A deemed admission can establish any fact, or "application of the facts to the law, or the truth of the ultimate issue, opinion or conclusion, so long as the opinion called for is not an abstract proposition of law." *Briggs v. King*, 714 S.W.2d 694, 697 (Mo. App. W.D. 1986). That rule

applies to all parties, including those acting *pro se*. *Research Hosp. v. Williams*, 651 S.W.2d 667, 669 (Mo. App. W.D. 1983). Regulation 1 CSR 15-3.420(1) applies that rule to this case.

Furthermore, Smith's interim suspension conclusively states that there is probable cause to believe that he is guilty of misconduct or unable to competently represent the interest of his clients. His disbarment action finds multiple, specific violations of the Rules of Professional Conduct.

Smith employed fraudulent or dishonest practices in the practice of law by failing to refund money even when ordered to do so, by charging unreasonable fees, and by failing to promptly and timely work on his clients' issues.

Incompetency is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability, to perform in an occupation. *Tendai v. Missouri State Bd. of Reg'n for the Healing Arts*, 161 S.W.3d 358, 369 (Mo. banc 2005). We follow the analysis of incompetency in a disciplinary case from the Supreme Court, *Albanna v. State Bd. of Reg'n for the Healing Arts*, 293 S.W.3d 423 (Mo. banc 2009). Incompetency is a "state of being" showing that a professional is unable or unwilling to function properly in the profession. *Id.* at 435. The Missouri Supreme Court disbarment and the admonitions illustrate either a lack of Smith's professional ability to practice law or a lack of disposition to use his professional ability. He had many opportunities to improve over the time of the admonitions, but he did not.

The Missouri Supreme Court spoke to Smith's untrustworthiness when it suspended his license and then disbarred him from the practice of law based upon the "substantial threat of irreparable harm to the public." We conclude from the disciplinary actions that Smith was incompetent and not worthy of trust.

We have previously concluded that financial irresponsibility means a lack of accountability with regard to the money or resources of oneself or another.³ Smith demonstrated financial irresponsibility in using his trust account for personal expenses, overcharging clients for legal representation, and refunding unearned money in an untimely manner.

Collateral estoppel prevents a party from relitigating issues of ultimate facts, but only those “necessarily and unambiguously decided.” *King Gen. Contractors v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. banc 1991). The doctrine applies if: (1) the issue decided in the earlier action is identical to the issue presented in the present action; (2) the earlier action was decided on the merits; (3) the party to be precluded was a party, or is in privity with a party, to the earlier action; and (4) the party to be precluded had a full and fair opportunity to litigate the issue. *Missouri Bd. of Pharmacy v. Tadrus*, 926 S.W.2d 132, 136 (Mo. App., W.D. 1996).

In this case, the decision on each admonition, the suspension and the disbarment was on the merits, Smith had a full and fair opportunity to litigate the issues, and the documents themselves illustrate that Smith actively participated in the case. We therefore conclude that there is cause to refuse Smith a license under § 375.141.1(8).

Lack of Discretion

With cases involving the Director, our discretion is limited by § 374.051.1, which states:

Any applicant refused a license or the renewal of a license by order of the director under sections 374.755, 374.787, and 375.141 may file a petition with the administrative hearing commission alleging that the director has refused the license. The administrative hearing commission shall conduct hearings and make findings of fact and conclusions of law in determining whether the applicant may be disqualified by statute. **Notwithstanding section 621.120,**

³ *Ponder v. Director*, Case No. 11-1478 DI (Aug. 2012); *Director v. Michael P. Ippolito, et al.*, Case No. 13-0390 DI (Aug. 2013).

the director shall retain discretion in refusing a license or renewal and such discretion shall not transfer to the administrative hearing commission.

(Emphasis added). Therefore, our review is limited to a determination of whether the Director had cause to refuse to issue a license, and we have no further discretion when there is any cause to support the Director's decision.

Summary

The Director has cause to refuse Smith's insurance producer license under § 375.141.1(1), (2), (3) and (8). We cancel the hearing.

SO ORDERED on April 28, 2015.

\s\ Audrey Hanson McIntosh
AUDREY HANSON MCINTOSH
Commissioner